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9 IN THE UNITED STATES BANKRUPTCY COURT
10 FOR THE NORTHERN DISTRICT OF CALIFORNIA
11 SAN JOSE DIVISION

12
13 **IN RE:**

14 **DAVID GREGORY McCLURE,**

15 Debtor.

CASE NO. 12-52306 MEH-13

Chapter 13

Adversary No. 17-05083

16 **DAVID GREGORY McCLURE,**

17 Plaintiff,

18 **v.**

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20 **STATE OF CALIFORNIA FRANCHISE TAX**
BOARD,

21 Defendant.
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**DEFENDANT CALIFORNIA
FRANCHISE TAX BOARD'S MOTION
FOR SUMMARY JUDGMENT**

Hearing: July 9, 2018
Time: 11:00 a.m.
Place: 3035
Judge: The Honorable M. Elaine
Hammond

1 Defendant California Franchise Tax Board (“FTB”) hereby moves pursuant to Rule 56(a) of
2 the Federal Rules of Civil Procedure, made applicable to bankruptcy proceedings by Rules 7056
3 and 9014(c) of the Federal Rules of Bankruptcy Procedure, for summary judgment determining
4 that the tax and interest on tax owed by plaintiff and debtor David Gregory McClure to FTB
5 related to the 2003 through 2007 tax years (the “subject liabilities”) were not discharged under
6 either 11 U.S.C. §§ 1328(a)(2) and 523(a)(1)(B)(ii), or the Order of Discharge entered in the main
7 bankruptcy case, Case No. 12-52306, on January 11, 2017 (the “Motion”).

8 The Motion is made on the following four grounds. First, the subject liabilities fall
9 squarely within the exception to discharge provided by the plain language of § 523(a)(1)(B)(ii).
10 It is undisputed that debtor was required to file his state tax returns related to the 2003 through
11 2007 tax years, that debtor filed those returns after the date on which they were last due, and that
12 debtor filed those returns after two years before the petition date. Second, it is undisputed that the
13 Order of Discharge entered in the main bankruptcy case specifically did not discharge debts
14 described in § 523(a)(1)(B). Third, it is undisputed that the confirmed Chapter 13 Plan did not
15 contain a provision that expressly or impliedly stated that the subject liabilities were discharged
16 despite the exception to discharge included in § 1328(a)(2). Fourth, the Ninth Circuit B.A.P.’s
17 holding in *Bisch v. United States of America (In re Bisch)*, 159 B.R. 546 (B.A.P. 9th Cir. 1993),
18 supports FTB’s position that a debt described in § 523(a)(1)(B) – such as the subject liabilities –
19 passes through bankruptcy unaffected by a discharge under § 1328(a).

20 The Motion is based upon this motion, the Joint Stipulation of Facts in Support of Cross-
21 Motions for Summary Judgment (filed on February 27, 2018 as Docket No. 7), the concurrently
22 filed Notice of FTB’s Motion for Summary Judgment and Memorandum of Points and
23 Authorities in Support of FTB’s Motion for Summary Judgment, the files and records in this
24 action, and any further evidence and argument that the Court may receive at or before the hearing.

25 WHEREFORE, defendant FTB prays for an order from this Court as follows:

26 1. That the Court enter judgment that the tax and interest on tax owed by debtor to FTB
27 related to the 2003 through 2007 tax years have not been discharged, and

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1 2. That FTB receive such other and further relief as this Court deems just and proper.

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3 Dated: May 21, 2018

Respectfully Submitted,

4 XAVIER BECERRA
5 Attorney General of California
6 ANNE MICHELLE BURR
7 Supervising Deputy Attorney General

8 /s/ Cara M. Porter
9 CARA M. PORTER
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